Filed 6/2/04 Katzin v. Phillips CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NINA H. KATZIN, Plaintiff and Respondent, v. BRADFORD A. PHILLIPS, Defendant and Appellant.	B167104 (Los Angeles County Super. Ct. No. BS080339)

APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Affirmed.

Hamburg, Karic, Edwards & Martin, Steven S. Karic and Fredric R. Brandfon for Defendant and Appellant.

Albert & Will and Mitchell J. Albert for Plaintiff and Respondent.

Bradford Phillips, an executive of a securities trading house, appeals from a judgment confirming an arbitration award against him based on the mishandling of Nina Katzin's brokerage account. He asks us to apply the standards of review employed by federal courts in arbitrations conducted under the Federal Arbitration Act (9 U.S.C. § 16(a)(3)). We conclude the FAA does not preempt the California rule strictly limiting review of arbitration awards and decline to consider Phillips' arguments under the federal standard. We reject his argument that the arbitrators exceeded their authority in making an award against him. We also decline to remand the matter to the arbitration panel for an apportionment of fault. Finally, we deny Katzin's motion for an award of sanctions on appeal.

FACTUAL AND PROCEDURAL SUMMARY

Katzin opened an account with InterFirst Capital Corporation (InterFirst) in 1998 with $22,500, which she describes as virtually her entire liquid net worth at the time. Her agreement with InterFirst called for the arbitration of any disputes. The arbitration clause provided for final and binding arbitration under the Federal Arbitration Act, waiver of the right to seek remedies in court, and limited discovery. It expressly stated: "THE ARBITRATORS' AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTIES' RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED." Katzin's broker at InterFirst was Yossi Attia. While Katzin was overseas from May 2000 through January 2001, Attia executed 73 trades in her account, used up to $70,000 in margin, and significantly changed the character of the account. Katzin had not authorized this activity. Attia generated increased commissions as a result.

Katzin filed a statement of claim with the National Association of Securities Dealers, Inc. (NASD) in April 2001 against InterFirst, Attia, and Brett Briggs, who was office manager of the InterFirst branch, alleging churning and unauthorized trading in her account. In an amended statement of claim filed in June 2002, Katzin added additional

respondents: InterFirst President Phillips, MHK Investments, Inc., First Allied Securities, Inc. (as successor to InterFirst) and Douglas Wright, who was chief compliance officer for InterFirst.[1] Phillips was identified as a control person who was liable under federal securities laws.

The arbitration was conducted before a panel of NASD arbitrators. Phillips was represented by counsel, but did not personally appear. The arbitrators entered an award holding InterFirst and Phillips jointly and severally liable to Katzin for $177,600 plus interest. Katzin reached a settlement with Attia and dismissed her claim against him. On December 31, 2002, Katzin filed a petition to correct and confirm the arbitration award in the Los Angeles Superior Court. Phillips then filed a petition to vacate the award in the United States District Court for the Central District of California, and later attempted to remove Katzin's superior court action to confirm the arbitration award to the United States Bankruptcy Court for the Central District of California. The bankruptcy court remanded the matter to the superior court on Katzin's motion. The district court denied Phillips' petition to vacate the award.

Phillips opposed the petition to correct and confirm the award in the superior court. He asked that the matter be remanded to the arbitrators to determine comparative fault among the respondents, including Attia. He also opposed an award of attorney's fees to Katzin for the petition to confirm the award. At the hearing, counsel for Katzin explained that she was not seeking an award of attorney's fees from Phillips. The trial court confirmed the award and entered judgment in favor of Katzin against Phillips for $161,350 plus interest. This amount reflected a setoff based on the amount Katzin received in her settlement with Attia. Phillips filed a timely appeal from the judgment.

---

[1] First Allied Securities, Inc. and MHK Investments, Inc. were dismissed from the arbitration by stipulation of the parties.

DISCUSSION

I

The first issue is the applicable scope of review. Phillips argues the federal standard applies because this was an arbitration governed by the Federal Arbitration Act (FAA). Katzin contends that the question is one of procedure and hence the California arbitration law rather than the FAA controls.

The issue is significant because "[i]t is established California law that under this state's arbitration act (Code Civ. Proc., § 1280 et seq.) the merits of an arbitration award are not subject to judicial review. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11, [10 Cal.Rptr.2d 183, 832 P.2d 899] ['[A] court may not review the sufficiency of the evidence supporting an arbitrator's award.']; *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 691 [72 Cal.Rptr. 880, 446 P.2d 1000] ['"Neither the merits of the controversy . . . nor the sufficiency of the evidence to support the arbitrator's award are matters for judicial review."']; *O'Malley v. Petroleum Maintenance Co.* (1957) 48 Cal.2d 107, 111-112 [308 P.2d 9] ['The merits of the controversy between the parties are not subject to judicial review [citations].']; 3 Cal. Law Revision Com. Rep. (Sept. 1961) p. G-53 ['Numerous court rulings have . . . developed the following basic principles which set the limits for any court review: [¶] . . . [¶] . . . Merits of an arbitration award either on questions of fact or of law may not be reviewed except as provided for in the statute in the absence of some limiting clause in the arbitration agreement.' (Fns. omitted.)].) Further, an erroneous decision in an arbitration is not an act in excess of the arbitrator's powers within the meaning of the California Arbitration Act. (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 28 ['It is well settled that "arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision."']; *O'Malley v. Petroleum Maintenance Co., supra,* 48 Cal.2d at p. 111 [same]; 3 Cal. Law Revision Com. Rep., *supra*, p. G-55 ['[A]rbitrators do not exceed their powers because of an erroneous reason for their decision, or because their reasoning is unsound . . . .' (Fns.omitted.)].)" (*Siegel v. Prudential Ins. Co.* (1998) 67 Cal.App.4th 1270, 1279-1280 (*Siegel*).)

The FAA creates a body of federal substantive law applicable in both state and federal courts requiring that arbitration agreements be honored. (*Siegel*, 67 Cal.App.4th at p. 1276.) In *Siegel*, the court rejected an argument that the federal standard allowing review of an arbitration award for manifest disregard of the law applies in California state court actions governed by the FAA. The court concluded that the FAA does not preempt California law limiting judicial review of arbitration awards. (*Id.* at pp. 1280, 1290.) The court applied the preemption analysis used by our Supreme Court in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394. That case held that procedural FAA provisions for a jury trial of questions regarding the existence of an arbitration agreement (9 U.S.C. § 4) do not apply in California state courts.

This analysis requires an examination of the express language of the FAA provision at issue and decisional authority concerning the preemptive effect of procedural federal statutes. (*Siegel*, 67 Cal.App.4th at pp. 1280-1281, citing *Rosenthal v. Great Westetrn Fin. Securities Corp., supra,* 14 Cal.4th at pp. 408-409.) As *Rosenthal* points out: "'[T]he procedural provisions of the [USAA] are not binding on state courts *. . . provided applicable state procedures do not defeat the rights granted by Congress*.' [Citation.]" (14 Cal.4th at p. 409.)

In applying this analysis to the scope of state court review of an arbitration award under the FAA, the *Siegel* court pointed out that the manifest disregard doctrine was not found in the FAA, but was judicially created by federal courts in the context of federal litigation. (*Siegel*, 67 Cal.App.4th at pp. 1277-1279, 1289-1290.) It also concluded that "California's rule precluding on the merits review of an arbitration award does not stand as an obstacle to full effectuation of the purpose of the [FAA] -- enforcement of arbitration agreements." (*Id*. at p. 1283.) *Siegel* also rejected an argument that the FAA permits a California court to evaluate whether the merits of an arbitration award were the result of a manifest disregard of the law. Instead, the limited grounds for vacating an arbitration award are those set out in Code of Civil Procedure section 1286.2. (*Id*. at pp. 1290-1291.)

We adopt the thorough reasoning of the court in *Siegel* and reject Phillips' arguments that we should apply the federal standards for review of the arbitration award here. In his reply brief, Phillips argues that the parties chose to be governed by federal law in signing the arbitration agreement. Paragraph 14 of the agreement, the arbitration clause, provides in part: "ANY ARBITRATION UNDER THIS AGREEMENT SHALL BE HELD UNDER AND PERSUANT [*sic*] TO AND BE GOVERNED BY FEDERAL ARBITRATION ACT, . . ." Paragraph 13 of the agreement provides that the agreement is to be construed, and the rights and liabilities of the parties determined, in accordance with California law. We find nothing in the agreement indicating any different intent by the parties. Thus, while the FAA substantive law applies, the procedural standard regarding review of an award does not.

We therefore decline to address Phillips' arguments that the judgment should be reversed because the arbitrators rendered an award in "manifest disregard" of the law, which is the FAA standard not applicable here. Our review of the award is limited to the grounds for vacating an award under Code of Civil Procedure section 1286.2. "Unless a statutory basis for vacating or correcting an award exists, a reviewing court 'shall confirm the award as made . . . .' (Code Civ. Proc., § 1286.)" (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 706.) Code of Civil Procedure section 1286.2, subdivision (a)(4) provides that an award may be vacated if the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

II

Citing only federal cases and no California authority, Phillips argues that the arbitrators exceeded their authority because Katzin's amended statement of claim did not name him in the body and because there was no evidence at the arbitration by him or concerning his knowledge of the unauthorized trading on Katzin's account.

The amended statement of claim alleges violations of sections 12(2) and 17(a) of the Securities Act of 1933, section 10(b) of the Securities Exchange Act of 1934, and Corporations Code section 25401 against all respondents, including Phillips. Phillips'

liability was based on his status as a "control person" over Attia. While the introductory paragraphs of the amended statement of claim identify Phillips as a control person, he is not specifically named in the securities law allegation, which includes this sentence: "InterFirst, First Allied, MHK, Wright and Briggs are all vicariously liable as control persons under Section 20 of the Securities Exchange Act of 1934 and Section 15 of the Securities Act of 1933." Katzin's amended statement of claim identified Phillips as a control person over Attia. A party may be found liable as a "controlling person" under section 15 of the Securities Act of 1933 (15 U.S.C. § 77o) and section 20(a) of the 1934 Securities Exchange Act (15 U.S.C. § 78t(a)).[2]

We also note that counsel representing Phillips and the other respondents in the arbitration filed a response to Katzin's amended statement of claim. The response did not deny Katzin's allegation that Phillips was President and CEO of InterFirst.

This record establishes that the issue of Phillips' liability to Katzin under the federal securities laws as a control person of InterFirst was properly presented to the NASD arbitrators. They did not exceed their jurisdiction in resolving that issue. We decline to address Phillips' arguments regarding the sufficiency of the evidence of his liability because that inquiry is improper under *Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at page 11 ["[A] court may not review the sufficiency of the evidence supporting an arbitrator's award."].

---

[2] Section 78t(a) of 15 United States Code provides: "Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." The standards for liability are not materially different under the two federal securities act. (*Hollinger v. Titan Capital Corp.* (9th Cir. 1990) 914 F.2d 1564, 1568, fn. 4.)

III

Phillips also argues the matter should be remanded to the NASD arbitrators for an apportionment of fault between himself and the other respondents named in the amended statement of claim.

The arbitrators expressly found Phillips and InterFirst jointly and severally liable to Katzin. As we have discussed, section 15 of the Securities Act of 1933 provides for joint and several liability for "[e]very person who . . . controls any person liable under sections 77k or 77l of this title . . . ." (15 U.S.C. § 77o.) Similarly, section 20(a) provides joint and several liability for controlling persons who aid and abet violations of the 1934 Act absent a finding of good faith and lack of inducement. (15 U.S.C. § 78t.) (See *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.* (9th Cir. 2003) 320 F.3d 920, 945.) We find no legal basis for an apportionment of liability. Phillips was entitled to, and received, a setoff representing the sum Attia paid to Katzin in settlement of her claims against him. He was not entitled to an apportionment of liability.

IV

Katzin moved for an award of sanctions of $16,755.50 against Phillips pursuant to California Rules of Court, rule 27 for taking a frivolous appeal. We conclude that sanctions are not warranted and deny the motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.